UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SANTA FE NATURAL TOBACCO CO., INC., Plaintiff, -against- ELIOT SPITZER, individually and in his official capacity as Attorney General of the State of New York, et al., Defendants.	00 Civ. 7274 (LAP)
BROWN & WILLIAMSON TOBACCO CORPORATION, and BWT Direct, LLC., Plaintiffs, -against- GEORGE E. PATAKI, in his official capacity as Governor of the State of New York, et al., Defendants.	00 Civ. 7750 (LAP)

LORETTA A. PRESKA, United States District Judge:

Plaintiffs have requested a temporary restraining order prohibiting the State from enforcing N.Y. Public Health Law § 1399-*ll* which restricts cigarette sales in New York to in-state retailers. The statute will become effective as to sellers of tobacco products on November 14, 2000.[1]

[1] Section 1399-*ll* provides, among other things, that:

(continued...)

DISCUSSION

I. Standard for Temporary Restraining Order

At oral argument, the parties agreed that where, as here, "a party seeks a preliminary injunction [or temporary restraining order] against 'government action taken in the public interest,' that party must demonstrate '[1] that it will suffer irreparable harm and [2] that it is likely to succeed on the

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[1](...continued)

> [i]t shall be unlawful for any person engaged in the business of selling cigarettes to ship or cause to be shipped to any person in this state who is not: (a) a person licensed as a cigarette tax agent or wholesale dealer under article twenty of the tax law or registered retail dealer under section four hundred eighty-a of the tax law; (b) an export warehouse proprietor pursuant to chapter 52 of the internal revenue code or an operator of a customs bonded warehouse pursuant to section 1311 or 1555 of title 19 of the United States Code; or (c) a person who is an officer, employee or agent of the United States government, this state or a department, agency, instrumentality or political subdivision of the United States or this state, when such person is acting in accordance with his or her official duties. For purposes of this subdivision, a person is a licensed or registered agent or dealer described in paragraph (a) of this subdivision if his or her name appears on a list of licensed or registered agents or dealers published by the department of taxation and finance, or if such person is licensed or registered as an agent or dealer under article twenty of the tax law.

N.Y. Pub. Health Law § 1399-*ll*(1).

merits.'" New York City Environmental Justice Alliance v. Guiliani, 214 F.3d 65, 68 (2d Cir. 2000) (internal citations omitted).

II. Irreparable Injury

While noting that there has been no discovery on the issue, defendants have not challenged at this time the plaintiffs' showing that they will suffer irreparable injury in the event that the statute is enforced. I note that in general, deprivation of a constitutional right constitutes irreparable injury. Brewer v. West Irondequoit Central School District, 212 F.3d 738, 744-45 (2d Cir. 2000); Mitchell v. Cuomo, 748 F.2d 804, 806 (2d Cir. 1984), quoting 11 C. Wright & A. Miller, Federal Practice and Procedure, § 2948, at 440 (1973) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is required."). More specifically, Santa Fe has demonstrated irreparable injury to the goodwill it has developed over years of serving New York consumers by remote sales of its legal tobacco products. Accordingly, I find that plaintiffs have demonstrated that they will suffer irreparable injury should the statute be enforced.

III. Likelihood of Success on the Merits

For today's purposes, I adopt the very concise statement of the applicable law set forth in C.A. Dickerson v. Bailey, 87 F. Supp.2d 691, 693 n.2 (S.D. Tex. 2000). As Judge Harmon noted there, "the threshold question is whether the challenged statute . . . discriminates on its face against interstate commerce and in favor of local businesses and is therefore per se invalid, in contrast to regulating commerce even handedly with only incidental effects on interstate commerce." Id. Here, the statute in effect bars out-of-state retailers of tobacco products in favor of in-state retailers of tobacco products by prohibiting the sale of cigarettes through the internet, or by telephone or mail order. As a result, the statute requires face-to-face sales in in-state bricks-and-mortar establishments.[2] "The ordinance thus deprives out-of-state businesses of access to a local [retail] market." C.& A. Carbone, Inc. v. Town of Clarkstown, New York, 511 U.S. 383, 389 (1994). This case is similar to the local processing cases reviewed by the Carbone court in which the

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[2] Unlike American Libraries Assoc. v. Pataki, 969 F. Supp. 160 (S.D.N.Y. 1997), this prohibition is not an attempt to regulate the internet, but rather to regulate the retail delivery of cigarettes to consumers. In this instance, the internet is merely incidental to the statutory scheme. I adopt Judge Sparks' comment that:

> [a]lthough the internet is a mighty powerful tool, it is not so potent as to demolish every state's regulatory schemes as they apply to the sale of goods and services. . . . [A]n activity which is appropriately regulated when accomplished through any other medium [does not] become[] sacrosanct when accomplished through the internet.

Ford Motor Co. v. Texas Dep't of Transp., 106 F. Supp.2d 905, 909 (W.D. Tex. 2000).

Court noted that "[t]he essential vice in laws of this sort is that they bar the import of the processing service." Id. at 391. Here, the statute on its face bars out-of-state concerns from retailing their products directly into New York in favor of local New York retailers. Accordingly, I find that plaintiffs are likely to be able to prove that the statute discriminates against interstate commerce, a result that the Dickerson court noted is generally "fatal and at a minimum triggers the strictest scrutiny." 87 F. Supp.2d at 693 n.2.

The Dickerson court noted that "[t]here is, nevertheless, a narrow class of cases that are an exception to the per se invalidity rule where 'the [state] can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest.'" Id., citing Hughes v. Oklahoma, 441 U.S. 322, 337 (1979); City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978). Even if the statute does not discriminate on its face, as the Dickerson court pointed out, I must then apply "a balancing test to determine its constitutionality and uphold[] the statute unless it places a burden on interstate commerce that is 'clearly excessive in relation to the putative local benefits.'" Dickerson, 87 F. Supp.2d at 693 n.2, quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (internal citation and quotation marks omitted). To determine whether the statute survives the strict scrutiny test or the more lenient Pike balancing test referred to by the Dickerson court, I must consider the state interests advanced by the statute.

The parties agree that the interests to be considered are those set forth in Section 1 of the statute entitled "Legislative findings." They are (1) public health, both of adults and of minors, specifically as to the latter, preventing them from becoming addicted to tobacco products, (2) "funding of health care pursuant to the health care reform act of 2000", (3) "the economy of the state", and (4) improving the state's ability "to measure and monitor cigarette consumption and to better determine the public health and fiscal consequences of smoking." See N.Y. Pub. Health Law § 1399-*ll*.

A. Health Benefits

As a preliminary matter, I note that “regulations that touch upon [health and] safety . . . are those that the Court has been most reluctant to invalidate.” Kassel v. Consolidated Freightways Corp. of Delaware, 450 U.S. 662, 670 (1981) (internal quotation marks and citation omitted). In addressing the health benefits sought to be obtained by the statute, the State argues that maintenance of high prices on tobacco products, that is, prices that include the relatively recently-enacted $1.11 per pack tax, decreases smoking, both by adults and minors. The parties agree that this is a legitimate local interest. While the State argues that an increase in the price of cigarettes decreases smoking, the evidence offered by the State is that an increase in price decreases in-state purchases of cigarettes, not necessarily smoking.

1. Adults

Under the strict scrutiny applied to a statute that discriminates against interstate commerce on its face, the State has failed to demonstrate that it has "no other means to advance this legitimate local interest." Dickerson, 87 F. Supp.2d 793, n.2. As discussed at oral argument and as demonstrated in the papers, the Jenkins Act, 15 U.S.C. § 375, et seq., requires interstate sellers of cigarettes to provide to the relevant state tax administrator on a monthly basis a list of purchasers, other than licensed distributors, to whom such products have been sold, including the person's name, address, brand and quantity purchased. Among the materials proffered by plaintiffs are papers demonstrating that when the State of California sent 4,946 consumers so listed a tax bill, over 78% of them paid. (Remes Aff., Ex. 2). Indeed, one consumer who was so billed stated that had he known that he would have to pay the tax, he would not have purchased the cigarettes over the internet. (Id., Ex. 30). The parties also agree that New York State has not pursued this avenue. In the absence of other evidence, the State's protestations that such efforts would be futile are mere speculation. The papers demonstrate, at least for today's purposes, that the

State's interest in decreasing adult smoking by maintaining high tobacco prices that include the State tax might well be achieved through pursuing the tax through enforcement of the Jenkins Act.

Under the Pike test, plaintiffs are likely to demonstrate that the statute also fails as to adults. There is no doubt that the statute places a heavy burden on interstate commerce. The local benefits with respect to adults, however, are not equally weighty. The papers indicate that few individuals start smoking as adults and, because adults are not as sensitive to price pressure as minors and, according to the State, are already addicted to nicotine, that the increased price may reduce the demand for cigarettes in New York, but will not deter adults from seeking less expensive cigarettes elsewhere; those New York adult smokers who now go across state borders or onto Indian reservations to purchase their tobacco products will continue to do so. Thus, the papers do not demonstrate that the State's legitimate interest in improving adult health by decreasing smoking will be achieved by this statute. Accordingly, plaintiffs are likely to be able to demonstrate that the heavy burden on interstate commerce is excessive in relation to the rather mediocre local benefits to be achieved with respect to adults.

2. Minors

The parties agree that preventing minors from access to tobacco products is a legitimate State interest and the State has taken certain steps to achieve that objective with respect to in-state retailers. For example, the State has required picture identification for purchase of tobacco products and has limited where vending machines may be located. (N.Y. Pub. Health Law §§ 1399-cc, 1399-dd). Employing the strict scrutiny test, the papers demonstrate that plaintiffs will likely be able to prove that the State has at its disposal a variety of other methods of achieving the laudable objective of verifying the age of tobacco purchasers. Those methods might include: (1) requiring purchases to be by credit card, (2) requiring a sizeable minimum purchase, (3) requiring age verification by the seller through faxed identification and delivery only to the adult identified in the identification document, and (4) requiring labeling of the tobacco products as such on the outside of the shipping wrapper, and requiring age verification of the recipient by the transporter. Thus, at least on the record before me now, plaintiffs are likely to be able to show that the statute fails the strict scrutiny test.

In employing the Pike balancing test, I note that, on these papers, the putative benefits of the statute are uncertain. Although the papers show that minors are sensitive to price increases of the kind effected by the recently-enacted $1.11 per pack tax, there has been no showing that minors account for any substantial amount of remote, i.e., non-face-to-face, purchases. Although I certainly acknowledge that the State need not "sit idly by and wait until potentially irreversible [health] damage has occurred . . . before it acts to avoid such consequences," Maine v. Taylor, 477 U.S. 131, 148 (1986), the only information in the record on this issue indicates that minors are in fact deterred from remote sales by the present system which includes minimum orders, non-cash payment and delayed gratification. There is no showing in the record that section 1399-*ll* would provide any benefits beyond those already in place with respect to remote sales to minors. Accordingly, with respect to minors, plaintiffs will likely be able to show that the statute places a burden on interstate commerce that is excessive in relation to the putative local benefits.

B. Health Care Funding

Because the revenue for these funds comes from collection of the tax imposed, the same analysis applies here as applied to adults' health interest, both under the Hughes strict scrutiny test and the Pike balancing test. Plaintiffs appear likely to be able to demonstrate that enforcement of the Jenkins Act would permit the State to follow up on non-taxed sales and to collect a good part of the revenue that would be realized by enforcement of section 1399-*ll*. In fact, enforcement of the Jenkins Act may deter minors even more from purchasing cigarettes through remote means than section 1399-*ll*. If minors know that each purchase is reported in order for the tax authorities to collect the tax, minors would be less likely to purchase through remote means because such purchases would no longer be anonymous.

C. The Economy of the State

The State defendants argue that this interest refers to the avoidance of economic detriment caused by smoking other than the economic detriment under the Health Care Reform Act of 2000. There is nothing in the record to support such an interpretation. Other than healthcare-related funding, which is separately listed in the legislative findings, the record on this motion discloses only two State economic interests at work. The first is the State's revenue interest. Following the increase in the applicable State tax to $1.11 per pack, the public press reported that in-state retail purchases of tobacco products decreased markedly. Indeed, even though the applicable tax had approximately doubled, there was but a relatively small increase in State revenue. Accordingly, as reflected in the Budget Report on Bills included as part of the bill jacket, it was noted under "Budget Implications" that:

> [e]nactment of this bill will help preserve the cigarette and tobacco products tax revenue estimates in the Financial Plan accompanying the 2000-01 Enacted Budget.

(Platkin Aff., Ex. A). Such revenue concerns, however, may not alone justify discrimination against interstate commerce. See, e.g., Carbone, 511 U.S. at 393.

The second State economic interest apparent in these papers is the decrease in profit to in-state tobacco retailers that resulted from the increase in the state tax and the corresponding decrease in in-state sales. As demonstrated in the papers, those retailers complained loudly about tobacco purchasers' seeking cigarettes across state lines and through remote sales. Indeed, several of these letters of complaint were included in the bill jacket for Senate Bill No. 8177, the Senate version of the statute. (Platkin Aff., Ex. A). Just as in Maine v. Taylor, these widely-reported rumblings create "an aura of economic protectionism," 477 U.S. at 143-44, an interest that has been subject to a "virtually per se rule of invalidity," id. at 148. Accordingly, on this record, the interest of the State in its tax revenue and the profitability of its retail tobacco merchants, though perhaps laudable, may not be considered in a commerce clause analysis.

D. Monitoring Consumption

Finally, although the statute makes reference to measuring and monitoring cigarette consumption and to better determining the public health and fiscal consequences of smoking, there is nothing in this record that indicates any such intent or any mechanism in this statute to achieve that not very weighty State interest. Indeed, at oral argument, counsel did not press this interest, and, accordingly, I may not consider it as a putative local benefit.

In sum, then, plaintiffs have demonstrated a likelihood of success on the merits. On these papers, plaintiffs have demonstrated the likelihood that Section 1399-*ll* will fail the strict scrutiny test because there appear to be other means by which the State can advance its legitimate interests. Plaintiffs have also demonstrated the likelihood that the statute will fail the Pike balancing test because the burden it imposes on interstate commerce is clearly excessive in relation to the putative local benefits.

CONCLUSION

Plaintiffs' request for an order temporarily restraining the enforcement of N.Y. Public Health Law Section 1399-*ll* is granted. Defendants and those acting in concert with them are so restrained for ten days from and including November 14, 2000.

SO ORDERED

November ___, 2000

LORETTA A. PRESKA, U.S.D.J.